




City of Loma Linda Official Report

Floyd Petersen, Mayor
Karen Hansberger, Mayor pro tempore
Robert Christman, Councilmember
Stan Brauer, Councilmember
Robert Ziprick, Councilmember

COUNCIL AGENDA: March 9, 2004
TO: City Council
FROM: Dennis R. Halloway, City Manager 
SUBJECT: Agreement with Deer Park LLC for planning the south hills

RECOMMENDATION

It is recommended that the City Council approve an agreement with Deer Park LLC to include the City owned property in a master plan for the south hills.

BACKGROUND

At your meeting of February 24th you approved including the city owned property in the south hills in a master plan done at the expense of Deer Park LLC. The City Attorney has drafted the attached agreement with Deer Park LLC for your consideration.

FINANCIAL IMPACT

The only costs to the City would include City Council and staff time. If the City chooses to map their property we would be responsible for costs involved in the mapping.

CITY OF LOMA LINDA
AGREEMENT

THIS AGREEMENT is made and effective as of _____, 2004, between the City of Loma Linda, a municipal corporation ("City") and Deer Park, LLC, A Mission Development Company ("Deer Park"). In consideration of the mutual covenants and conditions set forth herein, the parties agree as follows:

1. TERM

This Agreement shall commence on _____, 2004 and shall remain and continue in effect for a period of _____ () months until tasks described herein are complete, unless sooner terminated pursuant to the provisions of this Agreement.

2. SERVICES

Deer Park shall, at its own expense, develop a proposed master plan for development of the south hills area of Loma Linda, including approximately 800 acres of City-owned property, and shall perform the tasks described and set forth in Exhibit A, attached hereto. Deer Park shall complete the tasks according to the schedule of performance which is also set forth in Exhibit A.

3. PERFORMANCE

Deer Park shall at all times faithfully, competently and to the best of its ability, experience and talent, perform all tasks described herein. Deer Park shall employ, at a minimum, generally accepted standards and practices utilized by persons engaged in providing similar services as are required of Deer Park hereunder in meeting its obligations under this Agreement.

4. CITY COOPERATION

The City shall provide staff support, available data, existing maps, access to City-owned property and other reasonable assistance, including assistance in scheduling and conducting public study sessions or other meetings to consider such plans and proposals as are developed by Deer Park pursuant to this agreement.

5. EXCLUSIVE AGREEMENT

In consideration of Deer Park's performance hereunder, the City agrees that, for the period of six (6) months commencing on the date of this agreement, City will not enter into any competing agreement for the planning, development or sale of the City-owned property.

6. ACKNOWLEDGMENTS

Deer Park hereby acknowledges that, prior to final approval, any proposed plans resulting from Deer Park's performance of this agreement shall require full CEQA compliance, public hearings, and formal consideration and approval by the City and by other responsible agencies, in compliance with all applicable laws. The City's participation and assistance in Deer Park's development of proposed plans shall not imply any intent or obligation to approve any proposed plan, to enter into any future development agreement, to pay for any engineering or other costs, or to sell any interest in the City's property.

7. CITY MANAGEMENT

The City Manager or his/her delegate shall represent City in all matters pertaining to the administration of this Agreement, review and approval of all products submitted by Deer Park, but not including the authority to enlarge the Tasks to be performed or establish any compensation due to Deer Park. City's City Manager shall be authorized to act on City's behalf and to execute all necessary documents that enlarge the Tasks to be performed or change Deer Park's compensation, subject to Section 5 hereof.

8. NO COMPENSATION

Deer Park shall not be compensated for any services rendered or costs incurred in connection with its performance of this Agreement, or which are in addition to those set forth herein, unless such additional services are authorized in advance and in writing by the City Manager, with the prior approval of the City Council. Deer Park shall be compensated for any additional services in the amounts and in the manner as agreed to by City Manager and Deer Park at the time City's written authorization is given to Deer Park for the performance of said services.

9. SUSPENSION OR TERMINATION OF AGREEMENT WITHOUT CAUSE

(a) The City may at any time, for any reason, with or without cause, suspend or terminate this Agreement, or any portion hereof, by serving upon the Deer Park at least ten (30) days prior written notice. Upon receipt of said notice, the Deer Park shall immediately cease all work under this Agreement, unless the notice provides otherwise. If the City suspends or terminates a portion of this Agreement, such suspension or termination shall not make void or invalidate the remainder of this Agreement.

10. DEFAULT OF DEER PARK

(a) Deer Park's failure to substantially comply with the provisions of this Agreement shall constitute a default. In the event that Deer Park is in default for cause under the terms of this Agreement, City shall have no obligation or duty to continue assisting Deer Park with any work performed after the date of default, and can terminate this Agreement immediately by written notice to Deer Park. If such failure by Deer Park to make progress in the performance of work hereunder arises out of causes beyond Deer Park's control, and without fault or negligence of Deer Park, it shall not be considered a default.

(b) If the City Manager or his/her delegate determines that Deer Park is in default in the performance of any of the terms or conditions of this Agreement, he/she shall cause to be served upon the Deer Park a written notice of the default. Deer Park shall have ten (15) days after service upon it of said notice in which to cure the default by rendering a satisfactory performance. In the even that the Deer Park fails to cure its default within such period of time, the City shall have the right, notwithstanding any other provision of this Agreement, to terminate this Agreement without further notice and without prejudice to any other remedy to which it may be entitled at law, in equity or under this Agreement.

11. OWNERSHIP OF DOCUMENTS

(a) Deer Park shall maintain complete and accurate records with respect to billed time, sales, costs, expenses, receipts and other such information required by City that relate to the performance of services under this Agreement. Deer Park shall maintain adequate records of services provided in sufficient detail to permit an evaluation of services. All such records shall be maintained in accordance with generally accepted accounting principles and shall be clearly identified and readily accessible. Deer Park shall provide free access to the representatives of City or its designees at reasonable times to such books and records; shall give City the right to examine and audit said books and records; shall permit City to make transcripts therefrom as necessary; and shall allow inspection of all work, data, documents, proceedings, and activities related to this Agreement. Such records, together with supporting documents, shall be maintained for a period of three (3) years after receipt of final payment.

(b) Upon completion of, or in the event of termination or suspension of this Agreement, copies of all documents, designs, drawings, maps, models, computer files, surveys, notes, and other documents prepared in the course of providing the services to be performed pursuant to this Agreement shall be provided to the City and may be used, reused, or otherwise disposed of by the City without the permission of the Deer Park. With respect to computer files, Deer Park shall make available to the City, at the Deer Park's office and upon reasonable written request by the City, the necessary computer software and hardware for purposes of accessing, compiling, transferring and printing computer files.

12. INDEMNIFICATION

(a) Indemnification for Professional Liability. When the law establishes a professional standard of care for Deer Park's services, to the fullest extent permitted by law, Deer Park shall indemnify, protect, defend and hold harmless City and any and all of its officials, employees and agents ("Indemnified Parties") from and against any and all losses, liabilities, damages, costs and expenses, including attorney's fees and costs to the extent same are caused in whole or in part by any negligent or wrongful act, error or omission of Deer Park, its officers, agents, employees or consultants (or any entity or individual that Deer Park shall bear the legal liability thereof) in the performance of professional services under this Agreement. With respect to the design of public improvements, Deer Park shall not be liable for any injuries or property damage resulting from the reuse of the design at a location other than that originally specified.

(b) Indemnification for Other Than Professional Liability. Other than in the performance of professional services and to the full extent permitted by law, Deer Park shall indemnify, defend and hold harmless City, and any and all of its employees, officials, and agents

from and against any liability (including liability for claims, suits, actions, arbitration proceedings, administrative proceedings, regulatory proceedings, losses, expenses or costs of any kind, whether actual, alleged or threatened, including attorney's fees and costs, court costs, interest, defense costs, and expert witness fees), where the same arise out of, are a consequence of, or are in any way attributable to, in whole or in part, the performance of this Agreement by Deer Park or by any individual or entity for which Deer Park is legally liable, including but not limited to officers, agents, employees or consultants of Deer Park. Said indemnification shall include any CEQA claim, and any claim that Deer Park, or Deer Park's employees or agents, are considered to be employees of the City or are entitled to any employee benefits from City, including but not limited to those available under Public Employees Retirement Law.

(c) General Indemnification Provisions. Deer Park agrees to obtain executed indemnity agreements with provisions identical to those set forth here in this section from each and every consultant or other person or entity involved by, for, with, or on behalf of Deer Park in the performance of this Agreement. In the event Deer Park fails to obtain such indemnity obligations from others as required here, Deer Park agrees to be fully responsible according to the terms of this section. Failure of City to monitor compliance with these requirements imposes no additional obligations on City and will in no way act as a waiver of any rights hereunder. This obligation to indemnify and defend City as set forth here is binding on the successors, assigns or heirs of Deer Park and shall survive the termination of this Agreement or this section.

13. INSURANCE

Deer Park shall neither commence work under this Agreement until it has obtained all insurance required hereunder in a company or companies acceptable to City nor shall Deer Park allow any subcontractor to commence work on a subcontract until all insurance required of the subcontractor has been obtained. Deer Park shall take out and maintain at all times during the term of this Agreement the following policies of insurance:

(a) Workers' Compensation Insurance: Before beginning work, Deer Park shall furnish to City a Certificate of Insurance as proof that it has taken out full Workers' Compensation Insurance for all persons whom it may employ directly or through subcontractors in carrying out the work specified herein, in accordance with the laws of the State of California.

In accordance with the provisions of California Labor Code, Section 3700, every employer shall secure the payment of compensation to his employees. Deer Park shall, prior to commencing work, sign and file with City a certification as follows:

I am aware of the provisions of Section 3700 of the California Labor Code which require every employer to be insured against liability for Workers' Compensation or to undertake self insurance in accordance with the provisions of that Code, and I will comply with such provisions before commencing the performance of the work of this Agreement."

(b) Public Liability and Property Damage: Throughout the term of this Agreement, at Deer Park's sole cost and expense, Deer Park shall keep, or cause to be kept, in full force and effect, for the mutual benefit of City and Deer Park, comprehensive, broad form, general public liability and automobile insurance against claims and liabilities for personal injury, death, or property damage arising from Deer Park's activities, providing protection of at least One Million Dollars (\$1,000,000.00) for bodily injury or death to any one person or for any one accident or occurrence, and at least One Million Dollars (\$1,000,000.00) for property damage.

(c) Errors and Omissions: Deer Park shall take out and maintain at all times during the term of this Agreement, a policy or policies of insurance concerning errors and omissions ("malpractice") providing protection of at least Five Hundred Thousand Dollars (\$500,000.00) for errors and omissions ("malpractice") with respect to loss arising from actions of Deer Park performing services hereunder on behalf of City.

(d) General Insurance Requirements: All insurance required by express provision of this Agreement shall be carried only in responsible insurance companies licensed to do business in the State of California and policies required under Paragraph 8b shall name, as additional insureds, City, its elected officials, officers, employees, and agents. All policies shall contain language, to the extent obtainable, to the effect that (1) the insurer, insured and all subcontractors waive the right of subrogation against City and City's elected officials, officers, employees, and agents; (2) the policies are primary and noncontributing with any insurance that may be carried by City; and (3) they cannot be canceled or materially changed except after thirty (30) days' written notice by the insurer to City by certified mail. Deer Park shall furnish City with copies of all such policies promptly upon receipt of them, or certificate evidencing the insurance. Deer Park may effect for its own account insurance not required under this Agreement.

14. INDEPENDENT CONTRACTOR

(a) Deer Park is and shall at all times remain as to the City a wholly independent contractor. The personnel performing the services under this Agreement on behalf of Deer Park shall at all times be under Deer Park's exclusive direction and control and shall not be construed to be employees of City for any purpose, including eligibility under Public Employees Retirement Law. Neither City nor any of its officers, employees, or agents shall have control over the conduct of Deer Park or any of Deer Park's officers, employees, or agents, except as set forth in this Agreement. Deer Park shall not at any time or in any manner represent that it or any of its officers, employees, or agents are in any manner officers, employees, or agents of the City. Deer Park shall not incur or have the power to incur any debt, obligation, or liability whatever against City, or bind City in any manner.

(b) No City employee benefits shall be available to Deer Park in connection with the performance of this Agreement. Except for any fees paid to Deer Park as provided in the Agreement, City shall not pay salaries, wages, or other compensation to Deer Park for performing services hereunder for City. City shall not be liable for compensation or indemnification to Deer Park for injury or sickness arising out of performing services hereunder.

15. LEGAL RESPONSIBILITIES

Deer Park shall keep itself informed of State and Federal laws and regulations that in any manner affect those employed by it or in any way affect the performance of its services pursuant to this Agreement. Deer Park shall at all times observe and comply with all such laws and

regulations. The City, and its officers and employees, shall not be liable at law or in equity occasioned by failure of Deer Park to comply with this Section.

16. UNDUE INFLUENCE

Deer Park declares and warrants that no undue influence or pressure is used against or in concert with any officer or employee of the City of Loma Linda in connection with the award, terms or implementation of this Agreement, including any method of coercion, confidential financial arrangement, or financial inducement. No officer or employee of the City of Loma Linda will receive compensation, directly or indirectly, from Deer Park, or from any officer, employee or agent of Deer Park, in connection with the award of this Agreement or any work to be conducted as a result of this Agreement. Violation of this Section shall be a material breach of this Agreement entitling the City to any and all remedies at law or in equity.

17. NO BENEFIT TO ARISE TO LOCAL EMPLOYEES

No member, officer, or employee of City, or their designees or agents, and no public official who exercises authority over or responsibilities with respect to the Project during his/her tenure or for one year thereafter, shall have any interest, direct or indirect, in any agreement or sub-agreement, or the proceeds thereof, for work to be performed in connection with the project performed under this Agreement.

18. RELEASE OF INFORMATION/CONFLICTS OF INTEREST

(a) All information gained by Deer Park in performance of this Agreement shall be considered confidential and shall not be released by Deer Park without City's prior written authorization. Deer Park, its officers, employees, agents, or consultants, shall not without written authorization from the City Manager or unless requested by the City Attorney, voluntarily provide declarations, letters of support, testimony at depositions, responses to interrogatories, or other information concerning the work performed under this Agreement or relating to any project or property located within the City. Response to a subpoena or court order shall not be considered "voluntary" provided Deer Park gives City notice of such court order or subpoena.

(b) Deer Park shall promptly notify City should Deer Park, its officers, employees, agents or consultants be served with any summons, complaint, subpoena, notice of deposition, request for documents, interrogatories, requests for admissions, or other discovery request, court order, or subpoena from any person or party regarding this Agreement and the work performed thereunder or with respect to any project or property located within the City. City retains the right, but has no obligation, to represent Deer Park and/or be present at any deposition, hearing, or similar proceeding. Deer Park agrees to cooperate fully with City and to provide the opportunity to review any response to discovery requests provided by Deer Park. However, City's right to review any such response does not imply or mean the right by City to control, direct, or rewrite said response.

(c) Deer Park covenants that neither it nor any officer or principal of their firm have any interest in, or shall acquire any interest, directly or indirectly, which will conflict in any manner or degree with the performance of their services hereunder

19. NOTICES

Any notices which either party may desire to give to the other party under this Agreement must be in writing and may be given either by (i) personal service, (ii) delivery by a reputable document delivery service, such as but not limited to, Federal Express, which provides a receipt showing date and time of delivery, or (iii) mailing in the United States Mail, certified mail, postage prepaid, return receipt requested, addressed to the address of the party as set forth below or at any other address as that party may later designate by notice:

To City: City of Loma Linda
25541 Barton Road
Loma Linda, CA 92354

Attention: City Clerk

To Deer Park: Deer Park, LLC
24949 Prospect Ave.
Loma Linda, CA 92354

Attention: Glenn Elssmann

20. ASSIGNMENT

Deer Park shall not assign the performance of this Agreement, nor any part thereof, nor any monies due hereunder, without prior written consent of the City.

21. LICENSES

At all times during the term of this Agreement, Deer Park shall have in full force and effect, all licenses required of it by law for the performance of the services described in this Agreement, including a City of Loma Linda business license.

22. GOVERNING LAW

The City and Deer Park understand and agree that the laws of the State of California shall govern the rights, obligations, duties, and liabilities of the parties to this Agreement and also govern the interpretation of this Agreement. Any litigation concerning this Agreement shall take place in the municipal, superior, or federal district court with jurisdiction over the City of Loma Linda.

23. ENTIRE AGREEMENT

This Agreement contains the entire understanding between the parties relating to the obligations of the parties described in this Agreement. All prior or contemporaneous agreements, understandings, representations, and statements, oral or written, are merged into this Agreement and shall be of no further force or effect. Each party is entering into this Agreement based solely upon the representations set forth herein and upon each party's own independent investigation of any and all facts such party deems material.

24. CONFIDENTIALITY

Information and materials obtained by Deer Park from City during the performance of this Agreement shall be treated as strictly confidential and shall not be used by Deer Park for any purpose other than the performance of this Agreement.

25. DISCRIMINATION

Deer Park agrees that no person shall be excluded from employment in the performance of this Agreement on grounds of race, creed, color, sex, age, marital status, or place of national origin. In this connection, Deer Park agrees to comply with all County, State and Federal laws relating to equal employment opportunity rights.

26. AUTHORITY TO EXECUTE THIS AGREEMENT

The person or persons executing this Agreement on behalf of Deer Park warrants and represents that he/she has the authority to execute this Agreement on behalf of Deer Park and has the authority to bind Deer Park to the performance of its obligations hereunder.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed the day and year first above written.

CITY OF LOMA LINDA

DEER PARK, LLC, A Mission
Development Company

By: _____
[City Manager or Mayor]

By: _____
(Signature)

Attest:

(Typed name)

City Clerk

(title)

Approved as to Form:

City Attorney